


Below is an Opinion of the Court.

  
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PETER C. MCKITTRICK  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In Re:	)	
PEAK WEB LLC,	)	Bankruptcy Case No.
	)	16-32311-pcm11
Debtor.	)	
_____	)	
MACHINE ZONE, INC.,	)	Adversary No. 16-3083
	)	
Plaintiff,	)	MEMORANDUM OPINION
	)	
v.	)	
	)	
PEAK WEB LLC,	)	
	)	
Defendant.	)	
_____	)	
PEAK WEB LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
MACHINE ZONE, INC. and	)	
EPIC WAR LLC,	)	
	)	
Defendants.	)	
_____	)	

1 Debtor Peak Web LLC moves for remand of this consolidated action  
2 that was removed from California state court to this court by defendants  
3 Machine Zone Inc. and Epic War LLC. For the reasons that follow, the  
4 motion will be granted.

5 PROCEDURE

6 Debtor supported its motion for remand with declarations. At an  
7 August 4, 2016, hearing on a motion in the main case, Case No. 16-32311,  
8 the court discussed with counsel the parties' intention with regard to  
9 presenting evidence on this motion for remand. Counsel for Machine Zone  
10 indicated that he would either simply file a responsive brief or a brief  
11 and declaration. Transcript of August 4, 2016, hearing at 11:16-17,  
12 Docket # 219. Debtor's counsel indicated that he would talk to  
13 litigation counsel about presentation of evidence. Id. at 11:4-6. The  
14 court left it to the parties to decide whether they wanted to present  
15 evidence by declarations, and set a deadline for submission of any  
16 further declarations. Id. at 12:6-11.

17 After the August 4 hearing, Machine Zone filed an objection to the  
18 motion, which it supported with a declaration. Debtor filed a reply and  
19 two additional declarations. Machine Zone did not file any objections to  
20 the declarations submitted by debtor.

21 The court held a hearing on the motion on August 17, 2016. After  
22 counsel for Machine Zone had argued its position for more than an hour  
23 and had responded to the argument by debtor's counsel, Machine Zone's  
24 counsel for the first time objected to the court's consideration of the  
25 declarations filed by debtor, arguing that they were inadmissible hearsay  
26 if the declarant was not in court and subject to cross-examination.

1 The court continued the hearing to give Machine Zone an opportunity  
2 to cross-examine declarants who were not available for cross-examination  
3 at the August 17 hearing, and required Machine Zone to advise debtor and  
4 the court by close of business on August 18 which declarants it sought to  
5 cross-examine. On August 18, Machine Zone informed the court and debtor  
6 that it did not need to cross-examine any of the declarants. Thus, the  
7 continued hearing was cancelled. Pursuant to an agreement reached at the  
8 hearing, debtor submitted one additional declaration after the hearing  
9 that attaches a document Machine Zone wanted in the record. The court  
10 has considered the declarations in support of and in opposition to the  
11 motion, with the exception of the declaration of Ava Schoen, which debtor  
12 withdrew as unnecessary.

13 Counsel for the creditors' committee informed the court at the  
14 hearing that it supported trial of the case in whatever forum debtor  
15 prefers.

#### 16 FACTS

17 Debtor and Machine Zone were parties to an agreement under which  
18 debtor provided network hosting services for a mobile gaming application  
19 developed by Machine Zone. In November 2015, Machine Zone filed a  
20 complaint against debtor in the Superior Court of California, Santa Clara  
21 County. The complaint alleges causes of action for (1) breach of  
22 contract; (2) declaratory relief regarding the right to terminate a  
23 services agreement; (3) breach of the covenant of good faith and fair  
24 dealing; (4) fraudulent inducement and rescission under California state  
25 law; (5) negligent misrepresentation; and (6) promissory estoppel.  
26 Shortly thereafter, debtor filed a complaint against Machine Zone and its

1 subsidiary Epic War in the same state court, alleging claims for (1)  
2 misappropriation of trade secrets; (2) breach of contract; (3) breach of  
3 the covenant of good faith and fair dealing; (4) negligent  
4 misrepresentation; (5) fraudulent inducement; (6) unfair competition; (7)  
5 promissory estoppel; (8) conversion; and (9) declaratory relief regarding  
6 the parties' rights, obligations, and duties under their agreements.  
7 Both parties demanded a jury trial.

8 The state court consolidated the two actions for all purposes and  
9 assigned the case to the complex civil litigation department. This  
10 resulted in the assignment of a single judge for all purposes of the  
11 case, including discovery and trial, and meant that the trial date would  
12 not be postponed due to the priority of criminal trials. An early  
13 mediation attempt failed. The state court allowed discovery to proceed,  
14 and set a trial date for early March 2017, over Machine Zone's objection.

15 After debtor filed its chapter 11 case, Machine Zone removed the  
16 consolidated action to this court. The court understands that, as a  
17 result of Machine Zone's removal of the case to federal court, the state  
18 court has vacated the March 2017 trial date.

19 Debtor seeks remand of the consolidated action to the Santa Clara  
20 County California state court.

#### 21 DISCUSSION

22 Debtor's motion seeks permissive abstention under 28 U.S.C.  
23 § 1334(c),<sup>1</sup> or in the alternative equitable remand under 28 U.S.C.

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24  
25 <sup>1</sup> Because of this court's earlier ruling that the automatic stay  
26 did not apply to Machine Zone's removal of the action from state court,  
(continued...)

1 § 1452(b).

2 As the court explained in Security Farms v. Internat'l Brotherhood  
3 of Teamsters, 124 F.3d 999, 1009 (9th Cir. 1997), abstention is not  
4 applicable where the case has been removed from state to federal court.  
5 "Abstention can exist only where there is a parallel proceeding in state  
6 court." Id. There is no state court action pending that this court  
7 could abstain from hearing. Accord In re Lazar, 237 F.3d 967, 981 (9th  
8 Cir. 2001).

9 Equitable remand is governed by 28 U.S.C. § 1452(b), which allows  
10 the court to remand "on any equitable ground." This statute provides "an  
11 unusually broad grant of authority" to remand on equitable grounds. In  
12 re McCarthy, 230 B.R. 414, 417 (9th Cir. BAP 1999). Although courts have  
13 stated the test for equitable remand in various ways, the court should  
14 generally consider the factors set out in In re Cedar Funding, Inc., 419  
15 B.R. 807, 820 (9th Cir. BAP 2009), as well as "judicial economy and 'the  
16 effect of bifurcating the claims and parties' and 'the possibilities of  
17 inconsistent results.'" Cox v. Holcomb Family Ltd. P'ship, 2015 WL  
18 128001 at \*1 (Bankr. D. Or. 2015) (quoting In re Sequoia Village, LLC,  
19 2012 WL 478926 at \*1 (Bankr. D. Or. 2012)). The Cedar Funding factors  
20 are:

21 (1) the effect or lack thereof on the efficient administration of  
22 the estate if the Court recommends [remand or] abstention; (2) the  
23 extent to which state law issues predominate over bankruptcy issues;  
24 (3) difficult or unsettled nature of applicable law; (4) presence of  
related proceeding commenced in state court or other nonbankruptcy  
proceeding; (5) jurisdictional basis, if any, other than § 1334; (6)  
degree of relatedness or remoteness of proceeding to main bankruptcy

25  
26 <sup>1</sup>(...continued)  
debtor no longer asserts that abstention is mandatory.

1 case; (7) the substance rather than the form of an asserted core  
2 proceeding; (8) the feasibility of severing state law claims from  
3 core bankruptcy matters to allow judgments to be entered in state  
4 court with enforcement left to the bankruptcy court; (9) the burden  
5 on the bankruptcy court's docket; (10) the likelihood that the  
6 commencement of the proceeding in bankruptcy court involves forum  
shopping by one of the parties; (11) the existence of a right to a  
jury trial; (12) the presence in the proceeding of nondebtor  
parties; (13) comity; and (14) the possibility of prejudice to other  
parties in the action.

7 Cedar Funding, 419 B.R. at 820 n.18 (citing In re Enron Corp., 296 B.R.  
8 505, 508 n.2 (C.D. Cal. 2003)).

9 (1) The effect or lack thereof on the efficient administration of the  
10 estate

11 Machine Zone argues that keeping the litigation in this court would  
12 be more efficient for administration of the estate; debtor argues that  
13 the bankruptcy case can proceed on two tracks -- reorganization and  
14 litigation -- without impacting efficient administration of the estate  
15 and that, before removal, the state court was poised to resolve the  
16 litigation promptly.

17 I agree with debtor that this case can proceed on parallel tracks,  
18 with reorganization proceeding in this court and the Machine Zone  
19 litigation proceeding in state court. Debtor represented that, although  
20 the claims by and against Machine Zone are important to debtor and its  
21 reorganization, reorganization is not dependent on resolution of the  
22 claims. The possibilities of a large liability to Machine Zone or a  
23 large recovery from Machine Zone will affect the amount that will be  
24 available to distribute to creditors, but debtor represents, and there is  
25 no evidence to the contrary, that it can confirm a plan without first  
26 completing the litigation. Thus, the estate can be efficiently

1 administered without first resolving the Machine Zone litigation.

2 This is not a case where there are bankruptcy issues that need to be  
3 resolved before the state law claims can be determined.

4 Machine Zone argues that it would be more efficient to  
5 administration of the estate for this court to be able to control both  
6 the reorganization effort and the litigation. Oftentimes, when  
7 litigation is critical to the reorganization effort and litigation on two  
8 fronts will disrupt the reorganization process, bankruptcy court control  
9 of related litigation is important. That is not the case here, where the  
10 reorganization effort is not, according to debtor, dependent on  
11 resolution of the litigation and debtor wants to proceed in the forum  
12 both parties initially chose.

13 Before this consolidated litigation was removed to federal court,  
14 the state court had assigned the case to the complex civil litigation  
15 department, assigned a judge who would handle the case from start to  
16 finish, and set an early trial date, which would not be rescheduled based  
17 on priority criminal cases. This demonstrates that, had the consolidated  
18 cases not been removed, relief from stay could have been obtained  
19 promptly and the litigation could have proceeded to a timely resolution.  
20 It is likely that, upon remand, the state court will renew its management  
21 of the case and set the trial promptly. Therefore, it is likely that the  
22 state court can provide prompt, efficient resolution of the litigation.  
23 To the extent the litigation is necessary to the reorganization, prompt  
24 resolution in state court will further rather than hinder that effort.

25 This court can efficiently move forward toward a confirmation  
26 hearing without having the litigation resolved. If issues arise

1 regarding voting rights, estimation of claims, and the like relating to  
2 confirmation, there are summary procedures available to resolve those  
3 issues without waiting for liquidation of the claims.

4 I conclude that remanding to state court will not have an adverse  
5 effect on the efficient administration of the estate. This factor weighs  
6 heavily in favor of remand.

7 (2) Extent to which state law issues predominate

8 State law issues not only predominate in this litigation; all claims  
9 are based on state law, not federal law. There are no bankruptcy issues  
10 that need to be determined before the case can be tried. This weighs in  
11 favor of remand to state court.

12 (3) Difficult or unsettled nature of applicable law

13 Debtor argues that, although this court is capable of resolving  
14 issues of state law, this case concerns complex legal issues relating to  
15 trade secrets or confidential information under California law, which  
16 state courts are in a better position to determine. I do not think that  
17 the legal issues raised in this litigation are particularly complex or  
18 novel.

19 However, the case has the potential to become factually complex,  
20 involving disputes about technical trade secrets and confidential  
21 information. The complex civil litigation court in Santa Clara County is  
22 likely better suited to resolve such complex technical commercial issues  
23 than is this court. This factor weighs in favor of remand.

24 (4) Presence of related proceeding commenced in state court

25 There is no related proceeding pending in state court. If this  
26 court were to retain the litigation, all claims could be resolved in

1 federal court. This factor weighs against remand.

2 (5) Jurisdictional basis, if any, other than 28 U.S.C. § 1334

3 Debtor argues that there is no basis for federal jurisdiction other  
4 than § 1334. Machine Zone argues that there is diversity jurisdiction.

5 There is a factual dispute over whether debtor is a citizen of  
6 California for purposes of diversity jurisdiction. If it is, then there  
7 is not diversity jurisdiction under 28 U.S.C. § 1332, because Machine  
8 Zone is also a citizen of California.

9 I conclude that whether or not there is a basis for diversity  
10 jurisdiction is not an important factor in deciding whether to remand in  
11 this case. There is no question that this court could retain the  
12 litigation in bankruptcy court as related to the bankruptcy case,  
13 pursuant to 28 U.S.C. § 1334. There are no federal law claims. This  
14 factor is, in my view, neutral.

15 (6) Degree of relatedness or remoteness of proceeding to main bankruptcy  
16 case

17 This litigation is not remote to the bankruptcy case; debtor has  
18 acknowledged that the outcome of the litigation will affect the amount  
19 debtor can pay to creditors. The claims by Machine Zone against debtor  
20 are the largest claims against the estate; the claims by debtor against  
21 Machine Zone are the largest potential asset of the estate.

22 However, these important claims need not be resolved before the  
23 confirmation hearing, and there is no indication that confirmation is  
24 dependent on successful prosecution of the litigation. This factor  
25 weighs in favor of remand.

26 (7) and (8) The substance rather than form of an asserted core

1 proceeding and the feasibility of severing state law claims from core  
2 bankruptcy matters to allow judgments to be entered in state court with  
3 enforcement left to the bankruptcy court

4 The parties agree that these claims are not core proceedings,  
5 therefore these factors are neutral. See Cox, 2015 WL 128001 at \*2  
6 (these factors apply only to core proceedings).

7 (9) The burden on the bankruptcy court's docket

8 This litigation would create a burden on the bankruptcy court's  
9 docket if it were retained here. Because Machine Zone does not consent  
10 to entry of final judgment by the bankruptcy judge, this court would need  
11 to conduct all pre-trial matters and then transfer the case to the  
12 district court, thereby also burdening that court. The district court  
13 would have no prior knowledge of the parties or the case, requiring it to  
14 become familiar with the parties and the issues before trial.

15 Further, it is very possible that there will be significant pre-  
16 trial matters that will take a significant amount of the trial judge's  
17 time, whether matters of discovery disputes, motion practice, or the  
18 like. Although this court is certainly capable of resolving such  
19 disputes, the bankruptcy court's role is ordinarily focused on issues  
20 arising under bankruptcy law and managing the reorganization process, not  
21 conducting complex litigation.

22 The trade secrets claims will likely require evidence of details of  
23 technology that are outside the types of issues usually handled on this  
24 court's calendar.

25 On the other hand, the state court is fully equipped to and capable  
26 of adjudicating the claims and has the complex civil litigation  
department available to promptly and efficiently try the case. This

1 factor weighs in favor of remand.

2 (10) Forum shopping

3 This case does not involve any suggestion that debtor filed its  
4 bankruptcy case in Oregon in order to move California state litigation to  
5 this district and court. In fact, debtor wants the litigation to remain  
6 in state court.

7 Debtor argues that Machine Zone is forum shopping, in the sense of  
8 attempting to avoid remand, so that an important witness in the case,  
9 Cisco, will be outside the court's subpoena power. Debtor represents  
10 that Cisco is located in northern California and thus is subject to the  
11 jurisdiction of the California state court. Obtaining the testimony from  
12 Cisco in this court would add complexity and expenses.

13 Machine Zone argues that debtor can simply obtain an out-of-district  
14 subpoena and, if Cisco cannot be compelled to appear in this court (or  
15 district) to testify, its testimony can be presented by video deposition.

16 I agree with debtor that a video deposition is not the equivalent of  
17 live testimony. Debtor asserts that Cisco is a very important witness in  
18 the case. Although it is not clear to me that the reason Machine Zone  
19 removed this litigation from California state court was to preclude live  
20 testimony from Cisco, the prospect of forcing debtor to rely on video  
21 deposition testimony is troubling.

22 Nonetheless, I do not see the removal as forum shopping, other than  
23 the usual dispute in a removed case over which court is the appropriate  
24 forum for trial. This factor is neutral.

25 (11) Right to a jury trial

26 Both parties demanded a jury trial in their complaints and neither

1 denies that there is a right to a jury trial on the claims. Machine Zone  
2 does not consent to entry of final judgment by the bankruptcy court.  
3 This court cannot conduct a jury trial without consent of the parties and  
4 the approval of the district court. See Local Dist. Ct. Rule 2110-8(a).  
5 Trial would therefore require the involvement of both this court, in  
6 presiding over pre-trial matters, and the district court, which would  
7 preside over the jury trial.

8 In contrast, the complex civil litigation department of the state  
9 court in Santa Clara County can handle all pre-trial matters as well as a  
10 trial by jury, and enter final judgment. The right to a jury trial does  
11 not require remand, but it does weigh in favor of remand.

12 (12) Presence in the proceeding of nondebtor parties

13 There are no parties in this action other than debtor and Machine  
14 Zone and its subsidiary. There are no nondebtor parties over which this  
15 court lacks jurisdiction. Thus, the litigation could be completed in its  
16 entirety in this court, with the involvement of the district court. This  
17 factor weighs against remand.

18 (13) Comity

19 Comity implicates respect for the states and their laws and courts.

20 The claims in this litigation are all California state law claims,  
21 which the California state courts are well-suited to decide.

22 On the other hand, it does not appear that the state court had  
23 invested a substantial amount of time and effort in the case. The  
24 complaints were filed in November and December 2015. The cases were  
25 consolidated and assigned to the complex civil litigation department.  
26 Thereafter there were some skirmishes, including the filing of a motion

1 for a temporary restraining order, and the trial court held a case  
2 management conference. Discovery had commenced and was proceeding. The  
3 case was more than seven months old by the time Machine Zone removed the  
4 action to this court, but the parties had not yet filed any responsive  
5 pleadings or engaged in any motion practice.

6 Nonetheless, I conclude that, as a matter of comity, the state  
7 court's familiarity with the case as well as the fact that there are no  
8 federal claims weighs in favor of remand.

9 (14) Possibility of prejudice to other parties in the action

10 Machine Zone does not argue that it will be prejudiced by a remand  
11 to state court. In fact, the contract that is the subject of this  
12 dispute provides that California state law applies to any disputes and  
13 that the parties submit to jurisdiction in the courts of Santa Clara  
14 County to resolve disputes regarding the confidentiality provision.<sup>2</sup>  
15 There are no other parties to this action that would be prejudiced by  
16 remand. This factor weighs in favor of remand.

17 As for the additional factors from Sequoia Village, judicial economy  
18 will be enhanced by allowing this case to proceed in Santa Clara County  
19 state court. Litigation of the case in state court is likely to be more  
20 efficient than litigating in federal court. On remand, I anticipate that  
21 the case will again be assigned to a dedicated judge in the complex civil  
22 litigation department, which will manage the litigation and move it

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23  
24 <sup>2</sup> Machine Zone says that jurisdiction in Santa Clara County court  
25 is not exclusive, and that it applies only to equitable claims. Whether  
26 it is exclusive or applies only to equitable claims, the parties each  
filed their complaints in Santa Clara County, which is consistent with  
the contract provision.

1 toward an early trial. That court is likely better suited to resolve  
2 technical state law claims. Although the parties have at this point lost  
3 the March 2017 trial date because of Machine Zone's removal to this  
4 court, it is likely that the state court will again set a prompt trial  
5 date.

6 Retaining the case in this court will be less efficient, requiring  
7 this court's involvement in pre-trial matters and the district court in a  
8 jury trial and entry of final judgment. The district court judge would  
9 be new to the case and its history, requiring education at the end of the  
10 case. This is inefficient.

11 Machine Zone argues that this court already has a substantial  
12 background concerning this litigation, including information about debtor  
13 and its business, its financing, its principal, and other parties to the  
14 case. This court's familiarity with debtor's business and circumstances  
15 relates more to bankruptcy issues than to the issues presented in the  
16 litigation over breach of contract and trade secrets. If on remand the  
17 case is assigned to the same state court judge who handled it before  
18 removal, that judge will already have knowledge of the case from his pre-  
19 removal management. If it is assigned to a new judge, that judge can be  
20 brought up to speed quickly early in the litigation process.

21 Machine Zone argues that retention of this litigation in bankruptcy  
22 court would avoid piecemeal litigation and avoid the involvement of two  
23 courts in the liquidation of the claims. There is no issue of piecemeal  
24 litigation; all of the claims in the consolidated actions are based on  
25 state law and can be determined in state court. This is not a situation  
26 where some claims will need to remain in bankruptcy court and others will

1 be returned to state court; the consolidated case will stay together  
2 whether in federal or state court.

3 Machine Zone's concern that remand will result in the involvement of  
4 two different judges for the litigation does not support retaining the  
5 case here. There will be two judges involved regardless of where the  
6 case is tried -- either the bankruptcy judge (for bankruptcy issues) and  
7 the Santa Clara County judge, or the bankruptcy judge (for pre-trial  
8 matters) and the district judge. Judicial efficiency will be furthered  
9 by having a single judge handle the entire state court litigation.

10 The other Sequoia Village factors, relating to bifurcating claims  
11 and the possibility of inconsistent results, are not implicated in this  
12 case.

#### 13 CONCLUSION

14 Having taken all of the Cedar Funding factors into account, as well  
15 as considering judicial efficiency, I conclude that the consolidated case  
16 should be remanded to state court. This is not a close call. Many  
17 factors support my conclusion, but most important are that (1) all of the  
18 claims are state law claims that can be ably and efficiently adjudicated  
19 in state court; (2) debtor represents that completion of this litigation  
20 is not a prerequisite to its ability to propose and seek confirmation of  
21 a plan of reorganization, so the reorganization can proceed on a parallel  
22 track with the litigation; (3) debtor, who sought the protection of the  
23 bankruptcy court, wants to proceed in state court to litigate the claims,  
24 a choice supported by the unsecured creditors' committee; (4) this court  
25 could not conduct a jury trial or enter final judgment in this case  
26 without party consent and approval of the district court, so the case

1 would need to be sent to district court for trial; and (5) the state  
2 court in Santa Clara County is poised to try this case promptly. The  
3 factors weighing against remand or that are neutral are few and are not,  
4 in my view, significant enough to outweigh the factors that weigh heavily  
5 in favor of remand.

6 ###

7 cc: Timothy J. Conway  
8 Douglas R. Pahl  
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